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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 171

FEDERATED DEPARTMENT STORES, INC.,

Appellant,

—v.—

LAWRENCE E. GEROSA, as Comptroller of THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellant's Statement as to Jurisdiction, filed more than six months ago, dealt with each of the arguments contained in the motion of the City of New York to dismiss this appeal or to affirm the judgment appealed from. We find it necessary, therefore, to add but a few comments in reply.

I.

The City concedes that its tax on interstate receipts increases as appellant's out-of-City business increases (R. 17-18, 48-49, 564; Statement as to Jurisdiction, App. A, p. 33). It attempts to justify this result by pointing to the so-called Massachusetts or three-factor formula, which,

it says, if applied to total receipts, would result in an increased City tax (Motion, pp. 19 and 22). But, unlike the Massachusetts formula, the City's tax on interstate receipts also increases as in-State sales decrease. Thus, the City's tax penalizes interstate commerce by increasing its levy on interstate receipts both as appellant's out-of-State sales go up *and* as appellant's in-State receipts go down. No decision of this Court approves such a tax.

None of the City's arguments directed to establishing some rational basis for its formula take account of this Court's "duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce." *Halliburton Oil Well Cementing Co.* v. *Reily,* 373 U.S. 64, 69 (1963), quoting *Best & Co.* v. *Maxwell,* 311 U.S. 454, 455-456 (1940). We called attention to these decisions (Statement as to Jurisdiction, pp. 14-15), but the City has chosen to ignore them.

Appellant does not contend, as the City suggests (Motion, p. 21), that there is any risk of taxation by other states of the interstate receipts themselves. The City's discriminatory formula creates a risk of multiple taxation because it is probable that the increased out-of-State receipts, which increase the tax on interstate receipts under the City's formula, will be taxed by those other states.

It is no answer that the amounts or percentages involved are small in relation to total receipts (Motion, p. 20). The dissent below, noting that the majority had approved the tax here largely on the ground that the percentages involved appeared small, said that this was an insufficient justification for an unconstitutional result (Statement as to Jurisdiction, App. A, p. 33; R. 564). The City's motion

ignores the logical constitutional analysis of that dissent, and can find nothing in the majority opinion to refute that analysis.

If this appeal is dismissed or the judgment affirmed, this case will inevitably be cited as the only authority for the proposition that a local gross receipts tax on interstate commerce can vary directly with the percentage of a taxpayer's sales outside the State and inversely with the percentage of a taxpayer's sales within the State. Local taxation of interstate business, already terribly complex, would thereby be made more so. The subject has for years given Congress concern (Statement as to Jurisdiction, pp. 12-13) and New York City's gross receipts tax on interstate business has been singled out for adverse comment on this very ground (House Report No. 565, 89th Cong. 1st Sess., p. 1088 (1965)).

II.

The City betrays the fallacy underlying its effort to justify its formula at page 16 of its motion, where it is stated that the formula assumes "that property and wages outside the City contribute to creating *all* receipts in similar proportions" (emphasis added). If the formula did this and applied a consistent rule to in-City property and wages, there would be no constitutional infirmity, for an increase in out-of-City receipts would no longer increase the percentage of interstate receipts taxed. However, this is just the opposite of what the formula does.

In determining what property and wages enter into its allocation fraction, the formula "deems" that out-of-City property and wages contribute to wholly out-of-City sales and to interstate sales by in-City stores, but *not* to sales by in-City stores within the State. Inconsistently, in-City

property and wages are "deemed" to contribute only to sales by in-City stores, within and without the State (Statement as to Jurisdiction, App. D, p. 40). Thus, in arriving at the arbitrary assumptions underlying its formula, the City ignored the obvious circumstance that out-of-City property and wages have just as much connection with New York City intrastate receipts as they have with New York City interstate receipts, and, conversely, that in-City property and wages have just as much connection with wholly out-of-City receipts as out-of-City property and wages have with interstate receipts originating in the City.

The City argues at page 20 of its motion that the basic assumption of its formula is that, where property and wages are unchanged, an increase in out-of-City receipts is likely to result in a relative decrease in New York City sales, "both interstate and intrastate". However, the formula's assumption is that only New York City interstate receipts will decrease (R. 254).* The formula's underlying assumption could be a concomitant decrease in both New York City interstate and intrastate sales only if it deemed that out-of-City property and wages contributed not only to wholly out-of-City receipts and New York City interstate receipts, but also to New York City intrastate receipts. As we have said, the City's formula does not do this, and its failure to do so is what produces in practical operation the discrimination against interstate commerce we challenge.

The City cites no support, judicial, academic or evidentiary, for its assumption that particular property or wages

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* The City's formula then treats less of the out-of-City property and wages as applying to the interstate receipts, and thus increases the tax on the interstate receipts, with the result, to which this appeal is directed, that an increase in out-of-City sales produces a higher New York City tax on the interstate receipts.

can be attributed to one type of receipt and not to another. Appellant's expert testified that there is no basis for any such assumption (R. 113-114, 163, 262-263), the facts of this case refute the assumption (Exhibit D, R. 303; Statement as to Jurisdiction, pp. 21-22), and the City itself says that "Increased interstate advertising or innumerable other factors may account for this [the actual] increase in the [appellant's] interstate sales" (Motion, p. 20). We need not—and do not—concede that the assumption, even if valid, could justify the formula's discriminatory effect on interstate commerce. Shorn of the assumption, the City's motion apparently concedes that the formula cannot be sustained.

CONCLUSION

The issue presents a substantial federal question and, if the City's motion were to be granted, the confusion existing in the already jumbled field of local taxation of interstate business would be further confounded.

The decision below was wrong, it is repugnant to the controlling decisions of this Court and it is unsupported by the facts.

Wherefore it is respectfully submitted that the motion to dismiss this appeal or to affirm the judgment appealed from should be denied and that the Court should note probable jurisdiction of the appeal.

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December 5, 1966